

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1160

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

-against-

WILLIAM M. RUFFIN,

Defendant-Appellant.

*On Appeal from a Judgment of Conviction of the United States
District Court for the Eastern District of New York.*

REPLY BRIEF FOR DEFENDANT-APPELLANT

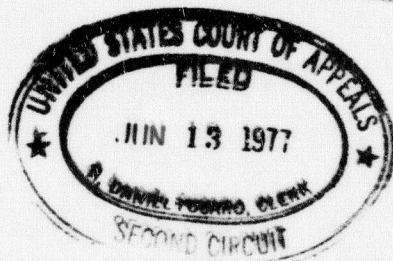
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77/1160

WILLIAM M. RUFFIN,

Defendant-Appellant.

On Appeal From A Judgment Of Conviction
Of The United States District Court For
The Eastern District Of New York.

-----x
REPLY BRIEF FOR DEFENDANT-APPELLANT

This Reply Brief is submitted in response to the Brief submitted by the Appellee(hereinafter referred to as "Appellee Br.") The principal Brief submitted on behalf of the Appellant is hereinafter referred to as "Main Br.". All references in this Reply Brief will be to the Appendix and the Exhibit Volumes pages submitted in support of this Appeal.*

*All references to Appendix pages "a", "aa", "b"
All references to Exhibit Volume pages "E"

THE TRIAL COURT ERRED IN DENYING
APPELLANT'S MOTION FOR SUPPRESSION

The Appellee Br. is factually incorrect when it states at page 16 and 19, that the Appellant was not the target of the investigation before the Grand Jury, before whom he had appeared on March 7 and 14, 1975, and before whom he had produced the documents set forth at Main Br. p.5.

Such was even found by the Court below. (28a, 42a, and Suppression Hearing Transcript pp. 125-126) The Court below ruled at 42a and Suppression Hearing Tr. pp. 125-126, that at page 19 of the first day, March 7, 1975, Defendant had become a target of the investigation and a potential defendant.

A careful study of the evidence adduced at the Suppression Hearing demonstrates, that the Appellant was in fact and in law a target of the investigation. This Court should also take judicial notice of the fact, that this Appellant on April 2, 1977 was indicted by this same Grand Jury for alleged violations of 42 U.S.C. 2703 in Docket No. 77 Cr. 182, for allegedly mis-applying Federal anti-poverty funds. When the Appellant was called before the Grand Jury, he was a target of the investigation into the misuse of funds by Bedford-Stuyvesant.

The Appellant was a potential defendant and was eventually indicted by that Grand Jury for the same crimes that were admitted by the Assistant United States Attorney, who testified in the Court below investigation by the Grand Jury. As a target of that investigation, Appellant was entitled to be warned of such as setforth in United States v. Jacobs, 531, F.2d 87(2d Cir. 1976), remanded for findings consistent with United States v. Mandujano, 425 U.S. 564 (1976), opinion issued, 547 F.2d 772 (1976).

The Appellee Br. is also factually incorrect when its states at page 14, that the issue of the "fruits of the poisoned tree" was not raised at the Suppression Hearing in the Court below.(Suppression Hearing Tr. pp. 9, 13, 14, 56, and 59) In addition, the argument of the Appellee, that the mere fact that the Government did not put the statements obtained from the Appellant into evidence does not remove the illegality from the other evidence that was also illegally obtained and used to obtain the conviction. It is admission that the Appellee was aware of the illegality issue .

As setforth on page 15 of the Main Br., in Fahy v. Connecticut, 375 U.S. 85, (1963), the Supreme Court

held that the prejudicial effect of illegally obtained evidence used to secure a conviction is supreme. Defendant is deprived of due process of law if his conviction is found in whole or in part upon illegally obtained evidence.

The Appellee is incorrect in its statement at page 16, that United States v. Jacobs, supra, is factually distinguishable. The Jacobs case is factually in point as to the Appellant being a target of the Grand Jury investigation.

In addition thereto, the Appellee Br. is an admission that the Assistant United States Attorneys did not comply with the American Bar Association Project On Minimum Standards For Criminal Justice, Relating To The Prosecution Functions (Approved Draft 1971) Section 3.6(d). This requirement of prosecutors who believe that the witness is a potential Defendant is mandatory in this Circuit. (Main Br. p.11). The Appellant should not have been compelled to testify before the Grand Jury without informing him that he should seek independent advice concerning his rights.

The Appellee Br. endeavors to lean upon the testimony of one of the Assistant United States Attorneys at the Suppression Hearing (Appellee Br. p.4) in stating to the Defendant that he might have a tax problem, and the statement of the other Assistant United States Attorney, at the

beginning of the Appellant's third appearance before the Grand Jury that in fairness "he may be implicating himself in violation of Federal law". This is in fact too little too late. The damage had been done at those points, Appellant's records had been taken, and his rights had already been violated.

Even worse, when Appellant appeared concerned and asked Assistant United States Attorney Goldman some questions, as to why he was there and what was going on (29a), Mr. Goldman deceived the Appellant by stating "It looks like you might have some tax problems". Mr. Goldman was making it appear that it was a civil tax matter. That act is further proof of the Appellee's improper conduct, in deliberately concealing from the Appellant that he was a potential defendant even after two (2) appearances before the Grand Jury.

The prosecutor did in fact look upon Appellant as a potential defendant at the time he was subpoenaed to appear before the Grand Jury because of his rental of 1402 Bedford Avenue, under a lease for five (5) years but never occupied. (This Brief p.2)

It is now obvious, that the Government chose to go with the tax case first, get more information from the

Appellant, and then use in the later indictment. To support this, the Appellant points to the fact, that it is the same evidence obtained from the Appellant at his March 7, and 14th, 1975 Grand Jury appearances being used to prosecute Appellant under the new indictment. Ironically, the Government's statement at the sentencing proves interesting on this point. (20a-21a)

THE APPELLEE'S BRIEF CONFIRMS THE LACK
OF SUFFICIENT EVIDENCE TO SUPPORT THE
VERDICT OF GUILT AGAINST THIS APPELLANT

The Appellee attempts in its Brief to create new evidence where none existed in the record. While it is true that the Government is allowed favorable inferences on evidence, it cannot create evidence out of an inference. The Appellee Br. on pages 6 and 19 relies heavily on the contention that the Appellant took graduate courses in Real Estate Taxation and Accounting in 1960. However, a reading of the transcript (144a-145a, 152a-153a) shows that no such evidence was adduced at the trial.

Aside from the fact that the Appellee's questions on those pages were improper, because they assumed facts not in evidence, and therefore, the Appellant's objections were sustainable, no witness testified, that in fact the Appellant in fact took graduate courses in Real Estate Taxation and Accounting in January, 1960.

Indeed, the Court below stated, out of the presence of the Jury, that he found that the Appellant did not know what he was doing when he made out the 1970 and 1971 corporate income tax forms. (Trial Transcript p.385)

The Appellee's Br. at p.21 makes reference to the Appellant taking bad debt and depreciation deductions. However, see 71a-72a where Revenue Agent Rosenblatt admitted, that Defendant understated many deductions to which he was legally entitled. Also compare Exhibit 23(E463-E464), Exhibit 2-I (E26), and Exhibit 3-K (E41).

It is important to note, that the Appellee in its Brief does not dispute the law that the mere understatement of income is not enough to find criminal tax liability. In this case, all we have is the mere understatement of income.

The Appellee at page 21 of its Brief failed to understand what was meant by the Appellant's argument in its Main Br. at pps. 27-28, that there was no evidence that the Defendant knew and understood, the concept of constructive dividend. In the instant case, the Government had to prove that the Appellant knew that he had to report this type of --constructive dividend--come.

Constructive dividend is obviously a complex point of law. But, the Government in the case at Bar had to show,

that the Appellant knew, that because the lease was with the corporation, Rugore, and therefore, the money spent for non-allowable business expenses, had to be reported on his personal return as a constructive dividend.

The facts reveal that the expenditures for 1418 Bedford Avenue, was as to constructive dividend, because the name of Ruffin is on one of the mortgage investment transactions. The facts reveal at best is evidence of a complex tax problem, that a tax specialist would have to litigate through the proper branch of the Internal Revenue Service. They do not represent facts that evidence criminal acts of a honorable, law-abiding citizen, who sought to assist in a poverty area, in providing a critically needed service. That is not the way our democracy works.

THE COURT BELOW COMMITTED PREJUDICIAL
ERROR IN ALLOWING THE TESTIMONY OF
WITNESS HAMILL

The Appellant in its Main Br. fully setforth its arguments and contentions with respect to the improper rebuttal testimony of witness Hamill. However, the Appellee Br. clearly, is in error as to the issue of the mortgages.

The Appellant never claimed that he owned any equity interest in the property in question, and the Appellee's Exhibits in evidence supports this statement. Within Exhibit 21 are checks numbered 351 (E340-341), 352 (E342-E343), 353 (E342-343), 354 (E342-E343), 346 (E350-E351), 358, 368 (E352-E353), 379 (E357-E358), and 380 (E357-358) in evidence showing that the funds were used to purchase mortgages.

Despite the Appellee's contention at page 31, the Appellant was allowed only a brief recess for Defense counsel to go to the Municipal Building to examine the records, before Appellant began his cross-examination. Appellee's contention at p.31 of its Brief, that Appellant was allowed to pose questions pertaining to facts not in evidence is absolutely incorrect. A reading of 172a-177a shows that the questions did not assume facts not in evidence.

Even if they did, such would not cure the prejudicial error. A reading of the transcript evidences that the witness Hamill was not knowledgeable, skilled, experienced, trained or educated concerning mortgages, and consequently could not answer the questions posed to him. (See 173a-176a). Therefore, the prejudicial error

in admitting this alleged expert testimony, from a non-expert witness severely and seriously damaged and prejudiced the Appellant before the Jury.

This is additionally true, if in fact the admission of this testimony was erroneously received under Rule 702 and 803(24) of the Federal Rules of Evidence. Since there was no way in which the Appellant could place before the Jury evidence of the fact that the witness Hamill did not know what he was testifying about.

It is argued by Appellant that a Special Agent, who previously worked in the Trusts and Estate Department of a New York City bank, is not and could not be knowledgeable in mortgage transactions. It is interesting to note that the witness even admitted that he did not understand, nor did he have time to read certain documents upon which he was called to testify in respect to, or to be cross-examined on.

It could be judicially noted by this Court that the fact that a purchase money mortgage purchased in March of 1968 and assigned in May, 1971 for \$5,000.00., and ultimately sold to Appellant for \$6,750.00, would create and establish for the purchasers of that mortgage

the legal obligations to pay the taxes, water, sewer rent, etc., in order to protect the investment.

However, the investment checks were not deducted as business expenses by the Appellant, as the Appellee would have this Court believe. It was only the expenses, i.e. the real estate tax, water, sewer, rent and other allowable business expenses that were deducted.

Moreover, the Appellee knew on December 9, 1976, when copies of the accountant's papers and worksheets, Appellant's Exhibit J, K, L, M, and N (E553, E560, E567, E578, and E596) were delivered to the Government, that Rugore purchased the mortgages of 1418 Bedford Avenue, and that such were carried on the books as an investment. The Appellee Br. is factually incorrect at page 32, when it states that the issue on this point was only joined the morning of the day of the rebuttal evidence (December 16, 1976).

Therefore, as stated in the Main Brief at page 43 Appellee had more than ample time to obtain the documents, that it believed would rebut this evidence. However, the Appellant was unfairly prejudiced by the admission of the Hamill testimony and Government Exhibit U, as improper rebuttal particularly, when it was admitted at a point in

the trial, when Appellant did not have the opportunity to rebut it, and to explain to the Jury, through witnesses and other evidence, that the two (2) mortgages, each having a face value of \$26,000.00 had been purchased by Rugore for \$8,000.00 and \$6,750.00.

Furthermore, the statement in the Appellant Br., that the admission of this evidence was proper under Federal Evidence Rule 803(24) is in error. The requirements under said rule had not been met, and Appellant did not have sufficient opportunity to prepare for sur-rebuttal on this point.

The Appellee is further in error on page 31 of its Brief in its contention, that the admission of this testimony was "if error at all, was harmless". It was gravely prejudicial. The witness Hamill was permitted to testify, and Government Exhibit U was admitted in evidence over Appellant's objections.

To permit the Appellee on rebuttal, to interject a \$26,000.00 original value of two (2) mortgages, when there was never any claim by Appellant that \$26,000.00 was paid for them by him, or that he was legally entitled to such as an allowable deductions for business expenses was grossly prejudicial. It could only have the effect of confusing the Jury. Appellant again urges that this

Court set aside the convictions obtained on this improper admission of evidence.

PROPER AND TIMELY OBJECTIONS WERE MADE
AS TO THE ADMISSION OF THE COMPUTER
PRINT-OUT DOCUMENTS INTO EVIDENCE BY
THE TRIAL COURT.

The Appellee Br. at page 33 incorrectly states, that Appellant waived objection to the admissability of Exhibits 18-A and 18B. Appellant calls to the Court's attention, that Appellee does not refute any of the law set forth in the Main Br. in Point VI (pp.45-54). Appellee does not cite a single case in support of its argument in opposition to this point.

However, Appellee does focus into manner in which the improper admission into evidence of Exhibits 18-A and 18-B came about.(48a) The Trial Court at the end of the pre-trial Suppression Hearing did not limit its ruling to merely the authenticity of the documents offered by the Government. The Trial Court ruled on the admission of those documents in toto, without the proper foundation. A reading of the transcript at 48a clearly supports this argument.

Exhibits 18-A and 18-B were admitted into evidence over Defendant's objections. Defense counsel properly noted his specific exception. Objections were

limited since the Government in its offer, which the Defendant's counsel objected to was limited. Defendant stated that he lacked sufficient knowledge of the documents, to properly argue Appellant's position in full. The Court nevertheless admitted them into evidence, to which Appellant noted his objection.

Until the words actually came out of the mouth of witness Martin, defense counsel did not know that he would testify that "590" meant, that the Appellant had communicated with Internal Revenue Service. Obviously, the Appellant could not object to the documents as to specifics until he knew what it was. However, the Appellant clearly did not waive its rights for the purposes of Appeal.(48a)

THE COURT BELOW'S CHARGE ON KNOWLEDGE
OF THE CONTENTS OF THE RETURNS WAS
PREJUDICIAL ERROR.

The Jury needed more than a signature on the returns to infer that Appellant knew the returns were false, in order to infer "wilfulness". The Appellee improperly argues the very point at issue as to the instructions by the Court taking away from the Jury, particularly in the instant case, the fact-finding

process of knowledge of the errors in the returns.

(Appellee Br. p.37)

A reading of the lower Court's charge as a whole, makes it clear, that the Jury was not instructed, that the Defendant's signature alone, under the evidence in this case was insufficient evidence of his "wilful" knowledge of the corporate returns.

Without more, the charge of the Court below at 227a is contrary to this Court's ruling in United States v. Tolkow, 532 F.2d 853, 857 (2d Cir. 1976), in adopting the position of the First Circuit in United States v. Romanov, 505 F.2d 813 (1st Cir. 1974) The evidence at the trial rebuttal the presumption of prima facie criminal knowledge of the contents of the corporate returns. Appellee's witness Rosenblatt, and Appellant's witnesses Stewart and Kladerman, overcame the presumption.

It was admitted by the Appellee's witness that Defendant had failed to take substantial deductions to which he was legally allowed, therefore, the presumption was overcome as a part of the Appellee's case.

CONCLUSION

For the reason set forth herein, and in the Appellant's Main Brief, the judgments of conviction of Counts IV, VII, and VIII should be reversed.

Respectfully submitted

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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 13th day of June, 1977 at 225 Cadman Plaza
Brooklyn, N. Y.

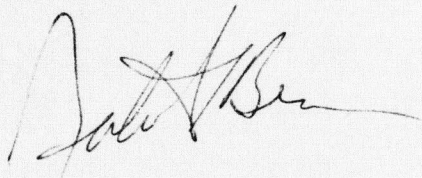
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Reply Brief

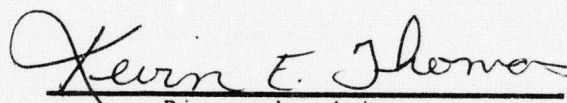
U.S. Atty-Eastern Dist. upon
David Trager

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 13th
day of June, 1977



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


Print name beneath signature
KEVIN E. THOMAS

